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Food Choice: Should the Government Be at the Head of the Table?

*Was the government to prescribe to us our medicine and diet,
our bodies would be in such keeping as our souls are now.*

– Thomas Jefferson¹

I. Introduction: Too Much Crying over Sold Milk

A year-long sting operation in Pennsylvania, complete with undercover identities, culminated in a pre-dawn raid one spring morning in 2010.² Federal agents investigated the man selling illicit substances by placing orders for such items under assumed names.³ In order to protect human health and safety, the federal authorities decided the man had to be stopped.⁴ The contraband in question? Raw milk.⁵ The perpetrator? Amish dairy farmer Daniel Allgyer, who had illegally provided raw milk to willing consumers across interstate lines.⁶

In June of the same year, but on the other side of the country, Los Angeles police officers busted down the doors of Rawesome Foods, an organic health food store, with guns drawn.⁷ Officers seized raw milk, unpasteurized cheese, and other groceries.⁸ James Stewart, the operator of Rawesome Foods, was arrested in August 2011 after authorities had investigated him for a year regarding the alleged sale of raw food products without proper permitting and licenses.⁹ Similar to the investigation of Allgyer, authorities posed as customers of the store.¹⁰

In perhaps the strangest of all the raids thus far, Nevada Southern Health District officials crashed a “farm-to-table” dinner party by destroying the

1. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 193 (David Waldstreicher ed., 2002).

2. Stephen Dinan, *Feds Sting Amish Farmer Selling Raw Milk Locally*, WASH. TIMES, Apr. 28, 2011, <http://www.washingtontimes.com/news/2011/apr/28/feds-sting-amish-farmer-selling-raw-milk-locally/>.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Stuart Pfeifer & P.J. Huffstutter, *3 Arrested on Raw-Milk Charges*, L.A. TIMES, Aug. 4, 2011, <http://articles.latimes.com/2011/aug/04/business/la-fi-milk-raid-20110804>.

8. *Id.*

9. *Id.*

10. *Id.*

food that the patrons had come to enjoy—with *bleach*.¹¹ Farm owners Laura and Monte Bledsoe had marketed their farm-to-table event within their local community.¹² After being informed by the Health District that their event was “public,” the hosts attempted to comply with regulations by obtaining a special use permit.¹³ Officials arrived on the night of the party and offered no solution except to destroy the food.¹⁴ Among the stated problems with the organic food, which was produced and prepared on the farm, was a lack of the following: labeling, USDA certification for some meat, and receipts for the food.¹⁵

These requirements seem irrational, considering that the appeal of the event was that the food was grown on a farm, picked from the ground, and then prepared on-site.¹⁶ Labeling, packaging, receipts, and certification would have created unnecessary burdens. However, the state officials claimed they had no choice but to enforce those requirements “[u]ntil the law is changed.”¹⁷ In some states, even more patently irrational regulatory behavior has occurred. Police in Oregon, Georgia, Wisconsin, and Pennsylvania have shut down lemonade stands operated by young children without small-business permits.¹⁸ Police in Missouri thwarted Girl Scouts’ efforts to sell their famous cookies from their own front yard.¹⁹

So, why the crackdown on Amish farmers, organic food providers, and Girl Scouts? When it comes to the Food and Drug Administration’s (FDA) stance concerning Amish farmers and their production of raw milk, “it is the FDA’s position that raw milk should never be consumed.”²⁰ The FDA seemingly will take all means necessary to enforce this position. In recent litigation, the FDA has expanded the paternalistic position that the agency knows what is best for citizens to consume. In a brief filed in the Northern District of Iowa, the FDA went so far as to declare that citizens possess no

11. J. Patrick Coolican, *Farm-to-Table Event Turns Sour When Health Inspector Crashes Party*, LAS VEGAS SUN, Nov. 12, 2011, <http://www.lasvegassun.com/news/2011/nov/12/farm-table-event-turns-sour-when-inspector-crashe/>.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *See id.*

17. *Id.*

18. Erin Rooney Doland, *Is Your Child’s Lemonade Stand Against the Law?*, HUFFINGTON POST, Aug. 16, 2013, http://www.huffingtonpost.com/women-co/lemonade-stand_b_1753057.html.

19. *Id.*

20. Dinan, *supra* note 2 (quoting Tamara N. Ward, an FDA spokeswoman).

fundamental right to choose what they eat.²¹ The pressing question: Is the FDA right? Or rather, would the United States Supreme Court agree with this stance?

This Comment discusses whether a fundamental right to be free from governmental intrusion into food choices exists within the penumbral rights established by the Supreme Court. It then continues to discuss whether pervasive federal and state food regulation impermissibly infringes on that right. In analyzing these issues, Part II provides a history of the evolution of food regulation in the United States. Part III explains the Supreme Court's reasoning in establishing unenumerated fundamental rights through a penumbra analysis and explores the various rights the Court holds fundamental within the right to privacy. Part IV discusses the FDA's position concerning a fundamental right to food choice and gives a broad overview of the federal food regulatory scheme. Next, Part V explores law enforcement authority under the Federal Food, Drug, and Cosmetic Act of 1938. Part VI then surveys a sample of state regulatory regimes. Part VII addresses trends in government paternalism and the FDA's paternalistic policy, along with food safety concerns in the current regulatory environment. Part VIII reflects on the drawbacks and future implications of establishing a fundamental right to food choice. Finally, Part IX discusses the different constitutional tests employed by the Supreme Court, determines the appropriate test for food choice, and applies that constitutional test. This Comment will ultimately illustrate why the right to choose which foods one consumes is fundamental within the penumbral rights recognized by the Supreme Court. Therefore, strict scrutiny should be applied when courts adjudicate any governmental infringement on that right.

II. A Helping of Public Protection with a Side of Increased Regulatory Authority

The Pure Food and Drug Act of 1906 (1906 Act) was the first national effort to regulate food.²² The 1906 Act represented a distinct departure from historical resistance to passing such legislation.²³ It was the first federal

21. Brief in Support of United States' Motion to Dismiss Plaintiff's Amended Complaint at 26, *Farm-to-Consumer Legal Def. Fund v. Sebelius*, No. C 10-4018-MWB, 2012 WL 1079987 (N.D. Iowa Mar. 30, 2012) [hereinafter Brief in Support].

22. Ilyse D. Barkan, *Industry Invites Regulation: The Passage of the Pure Food and Drug Act of 1906*, 75 AM. J. PUB. HEALTH 18, 18 (1985).

23. *Id.*

regulation “to address simultaneously product adulteration, production, distribution, and marketing of food, beverages, and drugs.”²⁴ As the United States and its industries grew, operating a business nationally came with increasing difficulty because of disparate regulations among states and the disconnect between state and federal regulations.²⁵ Consumers became aware that domestic food producers sold adulterated products at high prices.²⁶ At the same time, foreign products became strong competitors in the domestic market as consumer concerns about food safety rose.²⁷ Regulations required foreign products to meet higher standards for export than domestic standards.²⁸ Industry executives finally stopped attempts to block regulations at every turn, as they had been doing for decades, because they saw the positive implications of federal regulation: uniformity, consumer confidence, and regained competitiveness of products.²⁹ Even with their acquiescence, however, the 1906 Act was only minimally effective, as in 1911 the Supreme Court dealt the Act a crushing blow in *United States v. Johnson*.³⁰

The *Johnson* Court interpreted the 1906 Act’s prohibition of any “statement which shall be misleading in any particular,” to apply only to false statements about the *ingredients* of the food, not its other qualities.³¹ Congress amended the 1906 Act to repair the damage done by this decision, but consumers remained unaware of how little protection the legislation afforded them.³² The drafting committee reassembled in 1933 to revise the 1906 Act and quickly realized that a new act was necessary.³³ The new goal was to afford the consumer more complete protection.³⁴

The purpose of the Food, Drug and Cosmetic Act of 1938 was in part to “protect the public health by ensuring that foods are safe, wholesome,

24. *Id.*

25. *See generally id.* at 18-20.

26. *Id.* at 22.

27. *Id.*

28. *Id.*

29. *Id.* at 23-24.

30. 221 U.S. 488 (1911), *superseded by statute*, Act of Aug. 23, 1912, ch. 352, 37 Stat. 416, *as recognized in* Daniel Chapter One, No. 9329, 2009 WL 2584873 (F.T.C. Aug. 5, 2009).

31. *Id.* at 496-97 (quoting Act of June 30, 1906, ch. 3915, § 8, 34 Stat. 768).

32. *See* David F. Cavers, *The Food, Drug, and Cosmetic Act of 1938: Its Legislative History and Its Substantive Provisions*, 6 LAW & CONTEMP. PROBS. 2, 5 (1939).

33. *Id.* at 7.

34. *See id.* at 6.

sanitary, and properly labeled.”³⁵ The Act afforded greater police and regulatory power to the FDA.³⁶ In addition, the Act gave FDA regulations “the force and effect of law,” lessening the burden on the government in a case against a food manufacturer that violated regulations.³⁷ In order to protect consumer health, the Act created fixed tolerance levels for certain adulterations in food (e.g., lead or arsenic used in pesticides) at levels much lower than were common at the time.³⁸ The Act directly improved the food supply by decreasing the alarmingly high food adulteration levels, but the regulatory power given to the FDA made it possible to bypass the legislative process in promulgating rules that have the far-reaching impact of law.³⁹

As the FDA’s position in recent litigation demonstrates, the FDA has now adopted a “government-knows-best” mentality regarding consumer health. This triggers discussion concerning the present regulations regarding raw milk, as well as other licensing and permitting required by the FDA and state regulatory schemes. How can the FDA declare that foods containing insect fragments, rodent filth, and larvae have only “aesthetic” defect,⁴⁰ but declare raw milk so dangerous as to ban all raw milk in interstate commerce?⁴¹

In 2011, Congress enacted new federal legislation to regulate food, the Food Safety Modernization Act (Modernization Act).⁴² This represents the most significant change in food safety law since the Food, Drug, and Cosmetic Act. The Modernization Act increased FDA power to access records relating to foods that may cause serious adverse health consequences or death in humans or animals.⁴³ Now, the FDA possesses unparalleled police power to search homes and businesses.⁴⁴ The apparent purpose of the Modernization Act was to focus on the prevention of food-borne illness by increasing regulatory oversight. Regulations now demand

35. 21 U.S.C. § 393(b)(2)(A) (2012).

36. Cavers, *supra* note 32, at 14-15.

37. *Id.* at 14.

38. *Id.* at 15.

39. *Id.* at 14-15.

40. See generally 21 C.F.R. § 110.110 (2013); *Defect Levels Handbook: The Food Defect Action Levels*, FDA, <http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/sanitationtransportation/ucm056174.htm> (last updated Feb. 2005).

41. 21 C.F.R. § 1240.61.

42. Food Safety Modernization Act of 2010, Pub. L. No. 111-353, 124 Stat. 3885 (2011).

43. 21 U.S.C. §§ 350c(a), 374(a)(1)(B) (2012).

44. See *infra* Part VII.

that hazards be evaluated at every step in certain food manufacturing processes,⁴⁵ because apparently the federal government's position is that a breakdown at any point could cause widespread illness. Thus, the Modernization Act represents an alarming trend in giving the FDA increasing power to regulate the cultivation and consumption of food.

III. Fundamental Rights: Basic Ingredients in Constitutional Protection

A. "Negative Rights" Theory: The Founders Baked It into the Constitution

Supreme Court constitutional jurisprudence consistently relies on the concept that the Constitution protects negative rights, rather than conferring positive ones.⁴⁶ For purposes of this Comment's analysis, the phrase negative rights refers to the rights of an individual to be free from the interference of another person (or the government). Historically, this has been the view of the majority of federal courts.⁴⁷ The Supreme Court has refused to hold that the Fourteenth Amendment imposes an obligation on the government to protect individuals from third parties.⁴⁸ In *DeShaney v. Winnebago County Department of Social Services*, the Court decided that a state government had no affirmative duty to protect a child from his abusive father.⁴⁹ The Court's strong stance can be seen in *Cruzan v. Director, Missouri Department of Health* as well as *DeShaney*.⁵⁰ Although federal and state governments have historically offered certain government services, the Court has routinely denied claims that the government must provide basic services, such as "decent housing, public education, medical care, and welfare assistance."⁵¹ The view that the Constitution protects negative rights can be explained as follows: if a person suffers a loss not attributable to government action, then the party cannot seek relief from the government.⁵² With this premise as the basis for constitutional interpretation, the Constitution not only delineates the government's powers

45. See, e.g., 9 C.F.R. §§ 318.1-318.24 (2014) (establishing rules for handling animal products in official establishments); 21 C.F.R. §§ 133.102-133.196 (2014) (providing handling requirements for cheese by type).

46. See generally David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

47. See *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1989).

48. *DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.*, 489 U.S. 189, 195 (1989).

49. *Id.*

50. See, e.g., *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

51. See Jenna MacNaughton, Comment, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 750 (2001) (citations omitted).

52. *Id.* at 754.

but also imposes an obligation to refrain from interfering with citizens' rights.⁵³ If the Constitution provides only for protection *from* government action, rather than a requirement *for* government action, then the government has no duty to correct any problems it did not cause.⁵⁴

Framing the issue in *DeShaney* differently could have produced a different result.⁵⁵ The Court framed the plaintiff-child's claim not as negligence on the part of the agency, but rather as asserting an affirmative right of the child to government protection from private violence.⁵⁶ Those who favor a positive rights view rely on the logical premise that there is no real distinction between action that creates a problem and inaction that allows the problem to be created.⁵⁷ In the context of food regulation, a positive rights theorist would reason that if the state or local government does not regulate (or improperly regulates) food and an outbreak of food-borne illness occurs, the government should be liable to the individuals that contracted the illness because inaction essentially caused the problem.⁵⁸ In contrast, negative rights proponents would view the government involvement in food regulation as an interference with citizens' health choices.⁵⁹ Under that perspective, it logically follows that the government has no liability for allowing citizens to make food choices completely within their personal discretion.

A positive rights theory of government could seriously inhibit personal freedoms, even those as basic as food choices. For the last few decades some constitutional scholars have proposed that citizens should have a "right to minimum subsistence";⁶⁰ however, finding that such a right exists imposes a moral duty on the government to provide it.⁶¹ Erwin Chemerinsky goes even further by suggesting that the Supreme Court should declare a constitutional "right to minimum government services."⁶² The extent to which the government may need to go in order satisfy such a right places a nearly insurmountable fiscal and judicial burden on state and

53. *Id.*

54. *Id.* at 756.

55. *Id.* at 751.

56. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 193 (1989).

57. *See* MacNaughton, *supra* note 51, at 754-56.

58. *See id.*

59. *See id.* at 754.

60. *See, e.g.,* Erwin Chemerinsky, *Making the Case for a Constitutional Right to Minimum Entitlements*, 44 MERCER L. REV. 525, 526-27 (1993).

61. *See* Dennis D. Dorin, *Utopian Dangers: Chemerinsky's "Right to Minimum Subsistence"*, 44 MERCER L. REV. 553, 554 (1993).

62. Chemerinsky, *supra* note 60, at 525.

federal resources.⁶³ Moreover, providing for such a right raises a myriad of issues. How does a court determine what level of basic necessities are needed for adequate subsistence? Does that include medical care, education, and child care? When litigation regarding a violation of the right floods the federal courts, will the courts be engaged in decision making that is best left for the executive and legislative branches?⁶⁴ Finally, more money to provide government entitlements inevitably requires increased taxes and obligations on the rest of the population, which is rarely a politically popular scenario.⁶⁵

Instead, establishing food choice as a fundamental right fits with the negative rights theory. The negative rights theory of government lends support to establishing a fundamental right to food choice because of the logical consequences of a positive rights theory of government. The right to minimum subsistence would likely be interpreted to include the positive right to certain amounts and types of food. The federal government would have to provide citizens with that minimum standard. This necessarily requires increased government regulation of food and the food supply, which contradicts establishing food choice as a fundamental right. Therefore, the right properly falls within the penumbral right to be free from government interference in one's private life and health choices.

B. The Penumbra Analysis: One Part Constitutional Amendments, Two Parts Common Sense

The nation's founders recognized in the Declaration of Independence that God endowed all mankind with "certain unalienable Rights, that *among* these are Life, Liberty, and the pursuit of Happiness."⁶⁶ Some of those rights were enumerated in the amendments to the Constitution as originally ratified.⁶⁷ But, more importantly, all other powers not delegated to the United States were left to the States and to the people.⁶⁸ In the Federalist Papers, James Madison wrote that the powers given to the federal

63. See Dorin, *supra* note 61, at 558-59 (discussing the necessity of governments providing a large and varied number of services if such a right were established, and that, in light of other mandatory government expenditures, a "sufficient" standard of living may be a very low standard).

64. *Id.* at 559.

65. Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 887-90 (2001).

66. THE DECLARATION OF INDEPENDENCE para. 2 (1776) (emphasis added).

67. See, e.g., U.S. CONST. amend. I-IX.

68. U.S. CONST. amend. X.

government by the Constitution are “few and defined. Those which are to remain in the State governments are numerous and indefinite.”⁶⁹

“Inalienable” is defined as that which is “[n]ot transferrable or assignable,” meaning something cannot be taken or *given* away.⁷⁰ It seems a simple concept that there are certain rights that no one can take away.⁷¹ The difficulty lies in determining which rights are actually inalienable and which are merely vested—rights bestowed upon citizens by their government, not God. The Supreme Court has established certain rights as “fundamental,” thereby making them more difficult to entirely remove from citizens, but not impossible.⁷² This is as close as the Court has come to recognizing that certain rights cannot be taken or given away. After all, the government may legally take a citizen’s life in certain circumstances.⁷³

The Constitution protects those rights “implicit in the concept of ordered liberty,” in addition to those rights that are specifically guaranteed to all Americans by the constitutional text.⁷⁴ Those unenumerated rights for which “neither liberty nor justice would exist if they were sacrificed,” are also deemed fundamental in nature.⁷⁵ The Court has described fundamental rights’ scope using the term “penumbras,” or the emanations from rights described in the Constitution’s text.⁷⁶ Enumerated rights are not limited solely to their text, but reach out beyond it to encompass rights incidental to the express right.⁷⁷ These rights do not function as isolated pinpricks of liberty, but rather they as points on a continuum.

The Court views several, but not all, amendments as containing penumbras. The First Amendment grants the implicit right to conduct activities associated with the enumerated rights.⁷⁸ For example, the Court

69. THE FEDERALIST NO. 45, at 208 (James Madison) (Jim Manis ed., 2001).

70. BLACK’S LAW DICTIONARY 827 (9th ed. 2009).

71. See W. CLEON SKOUSEN, THE 5000 YEAR LEAP: A MIRACLE THAT CHANGED THE WORLD 66 (10th ed. 2006).

72. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (identifying the right to marry as “fundamental to our very existence”).

73. *Gregg v. Georgia*, 428 U.S. 153, 207 (1976) (upholding a Georgia jury’s imposition of the death penalty on a murder conviction because Georgia procedure properly focused the jury’s attention to the particularized nature of the crime).

74. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled in part by* *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

75. *Id.* at 326 (citing *Twining v. New Jersey*, 211 U.S. 78, 99 (1908)).

76. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

77. See *id.*

78. See *Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 536 (1925) (declaring unconstitutional an Oregon law prohibiting parents from sending

recognizes penumbral rights to marry and raise a family.⁷⁹ The Third Amendment implicitly grants the right to privacy by stopping soldiers (or other government law enforcement agents) from invading and quartering in one's home.⁸⁰ The Fourth and Fifth Amendments protect against all governmental invasions "of the sanctity of a man's home and the privacies of life."⁸¹ The Ninth Amendment states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."⁸² The enumerated and implicit guarantees that the Court has deemed fundamental cannot be used as an exclusive list, denying other rights.⁸³

Moreover, the Court regards penumbral rights as so fundamental that it has chosen to incorporate many of them against the states. Thus, the right to privacy is incorporated against the states through the Fourteenth Amendment in *Palko v. Connecticut*.⁸⁴ The Court expanded protection of citizens' constitutional immunities because they were "implicit in the concept of ordered liberty."⁸⁵

The fundamental role that food plays in health is readily illustrated by the familiar phrase "you are what you eat." The phrase originates from an early nineteenth century gastronome and epicurean, Jean Anthelme Brillat-Savarin.⁸⁶ The use of this adage for centuries demonstrates the long-standing societal and cultural understanding that food consumption has a direct link to health. The penumbral rights recognized by the Court extend to certain health choices and the right to bodily integrity. The right to food choice should fall within these rights.

children to private school); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (striking down a Nebraska law prohibiting the teaching of foreign languages).

79. See *Pierce*, 268 U.S. at 534-35 (recognizing penumbral right "of parents and guardians to direct the upbringing and education of children under their control"); *Meyer*, 262 U.S. at 399 (recognizing the right to "marry, establish a home, and bring up children").

80. See *Griswold*, 381 U.S. at 484.

81. *Boyd v. United States*, 116 U.S. 616, 630 (1886), *overruled on other grounds by* *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 284 (1967).

82. U.S. CONST. amend IX.

83. *Boyd*, 116 U.S. at 630.

84. *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937), *overruled in part by* *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

85. *Id.* at 325.

86. JEAN ANTHELME BRILLAT-SAVARIN, *THE PHYSIOLOGY OF TASTE* 166 (M.F.K. Fisher trans., 1949).

C. The Right to Privacy Soufflé with a Right to Privacy and Bodily Integrity Center

The right to be free from governmental intrusion has formed the basis of a right to make certain health choices without governmental input.⁸⁷ The most notable of these cases is *Roe v. Wade*.⁸⁸ In that case, the Court struck down a Texas statute making it a crime to “procure” an abortion.⁸⁹ Justice Stewart recognized “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁹⁰ Accordingly, a woman’s right to choose whether to terminate a pregnancy may not be impermissibly infringed by the government.⁹¹ The Court has also acknowledged that the Fourteenth Amendment provides a freedom from interference with bodily integrity.⁹² Recognizing this right, the Court in *Casey* also addressed state regulation and prevention of abortion, establishing the “undue burden” test for determining whether the government has impermissibly infringed upon a woman’s right to choose to terminate her pregnancy.⁹³

Individuals likewise have the right to make their own choices regarding medical treatment. For instance, the Court in *Cruzan* upheld the right to refuse lifesaving nutrition and hydration.⁹⁴ The Court reasoned that dying is a part of life, which is characteristically within the home and thus protected by the right to privacy.⁹⁵ Justice Stevens, though dissenting, even pointed out that “[t]he sanctity, and individual privacy, of the human body is obviously fundamental to liberty.”⁹⁶ The government’s forcible physical intrusion into one’s body is another such intrusion that violates the right to bodily integrity. The state may not even force a mentally ill prisoner to receive medical treatment unless his mental illness poses a significant

87. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 280 (1990); *Roe v. Wade*, 410 U.S. 113, 165 (1973).

88. 410 U.S. 113.

89. *Id.* at 117.

90. *Id.* 169-70 (Stewart, J., concurring) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

91. *Id.* at 165-66.

92. *Casey*, 505 U.S. at 851-52, 874.

93. *Id.* at 873.

94. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 270 (1990).

95. *Id.* at 341.

96. *Id.* at 342 (Stevens, J., dissenting).

threat.⁹⁷ It is a serious invasion of a person's liberty to have medicine forcibly injected into her body.⁹⁸

Thus, the right to bodily integrity has been recognized insofar as an individual has the right to be free from government intrusion in decisions regarding termination of pregnancy, the decision to refuse life sustaining nutrition and hydration, and the decision to refuse certain types of medications. If the "sanctity . . . of the human body is obviously fundamental to liberty,"⁹⁹ it does not seem rational that the government has complete discretion to regulate what individuals can or cannot put into their bodies. The FDA's position that "[t]here is [n]o [g]eneralized [r]ight to [b]odily or [p]hysical [h]ealth" appears contrary to the Court's statements that those choices pertaining to bodily integrity are protected by the right to privacy.¹⁰⁰ The right to cause one's own death by refusing to consume anything at all is fundamental. Then, does it not follow that conversely the right to eat what one chooses is fundamental?

One factor the Supreme Court has considered in determining whether a right is "fundamental" under the Constitution is whether the right is "deeply rooted in this Nation's history and tradition" such that the framers would have contemplated it when drafting the Constitution.¹⁰¹ Rights that have been considered "deeply rooted" include the rights to travel, vote, marry, procreate, choose abortion, enjoy private education, use contraception, and live with relatives.¹⁰² The Court has defined "deeply rooted" in several ways:

- "[B]ased on moral principles deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history"¹⁰³
- "[C]omport[ing] with the deepest notions of what is fair and right and just"¹⁰⁴

97. See *Washington v. Harper*, 494 U.S. 210, 225-26 (1990).

98. *Id.* at 229.

99. *Cruzan*, 497 U.S. at 342 (Stevens, J., dissenting).

100. Brief in Support, *supra* note 21, at 26.

101. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

102. See 16A AM. JUR. 2D *Constitutional Law* § 609 (2014) (collecting cases).

103. *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting), *abrogated* by *Ford v. Wainwright*, 477 U.S. 399 (1986).

104. *Id.*

- “[S]o rooted in the traditions and conscience of our people as to be ranked as fundamental”¹⁰⁵
- “[T]hose privileges long recognized at common law as essential to the orderly pursuit of happiness by free men”¹⁰⁶
- “[R]epresenting the very essence of a scheme of ordered liberty”¹⁰⁷

These varying interpretations of “deeply rooted” simply serve to guide the Court’s analysis as it determines the fundamental nature of certain rights. The Court often frames its analysis against the backdrop of which rights would have been contemplated at the time of the Constitution’s ratification in 1789.¹⁰⁸

The determination of whether the individual right to food choice is fundamental depends, in part, on whether that right is deeply rooted under the Supreme Court’s framework for analysis. The FDA maintains that there is “no ‘deeply rooted’ historical tradition of unfettered access to food of all kinds.”¹⁰⁹ However, widespread regulation in the United States *limiting* access to food only began in the early twentieth century as a byproduct of widespread food contamination.¹¹⁰ Those who historically studied food and agriculture recognized its direct link to health long before government food regulation took root.¹¹¹ Perhaps the right has been understood to be so essential that there was no need to specifically enumerate it as a right.

IV. The FDA’s Position That It’s the Only Cook in the Kitchen

The “inherent danger” of raw milk is the foundation of the FDA’s staunch policy against raw milk in interstate commerce.¹¹² Ultimately, this position, combined with Supreme Court Commerce Clause jurisprudence,

105. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

106. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

107. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled in part by* *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

108. *See, e.g., McDonald v. City of Chi., Ill.*, 130 S. Ct. 3020, 3036-37 (2010); *Griswold v. Connecticut*, 381 U.S. 479, 488-92 (1965).

109. Brief in Support, *supra* note 21, at 26 (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

110. *See supra* text accompanying notes 22-30, 35-38.

111. *See generally* BRILLAT-SAVARIN, *supra* note 86.

112. *See generally* JOHN F. SHEEHAN, ON THE SAFETY OF RAW MILK (WITH A WORD ABOUT PASTEURIZATION) (2005), *available at* <http://www.fda.gov/downloads/Food/FoodborneIllnessContaminants/UCM166069.pdf>.

could lead to shocking outcomes. Unfortunately, the ban on raw milk is only the first drop in the bucket.

A. Pushing Raw Milk Regulations Until the Cows Come Home

From the FDA's recent raids of raw milk farmers and retailers grew a crop of cases challenging the constitutionality of the federal and state raw milk regulations. However, litigation over raw milk bans occurred as early as 1983. In *Carbaugh v. Solem*, the Virginia Supreme Court determined that a "herd share," which was set-up by a producer of raw goat's milk, violated the state's ban on its sale.¹¹³ In an effort to take the sale of her milk outside the purview of state regulation, the farmer had a leasing arrangement whereby members leased the goats and were entitled to milk.¹¹⁴ However, her attempt was unsuccessful.¹¹⁵ Although such resistance to raw milk regulation has now existed for over thirty years, the litigation over the regulations has increased dramatically since the raids on Amish farmers and organic grocers.

In 2010, the New York Court of Appeals held that a similar agreement was "purposely designed to avoid cash sales of dairy products in an attempt to circumvent" state law.¹¹⁶ The court maintained that private association members were "consumers" although they held shares in a farm and were entitled to receive raw milk as a dividend, instead of buying raw milk in separate transactions.¹¹⁷ In the case against Daniel Allgyer, the aforementioned Amish farmer, the U.S. District Court for the Eastern District of Pennsylvania chastised the farmer's herd share arrangement as "merely a subterfuge to create a transaction disguised as a sale of raw milk to consumers."¹¹⁸ Courts have also upheld raw milk bans on the basis that private contracts are within the scope of the state's police power.¹¹⁹

113. *Carbaugh v. Solem*, 302 S.E.2d 33, 35 (Va. 1983).

114. *Id.*

115. *Id.*

116. *Meadowsweet Dairy, LLC v. Hooker*, 898 N.Y.S.2d 276, 280 (App. Div. 2010).

117. *Id.* at 1268-70.

118. *United States v. Allgyer*, No. CIV.A. 11-02651, 2012 WL 355261, at *4 n.15 (E.D. Pa. Feb. 3, 2012).

119. *E.g.*, Memorandum in Support of Government's Motion for Summary Justice at 14 n.9, *United States v. Allgyer*, No. 11-02651, 2012 WL 6645540 (E.D. Pa. Dec. 6, 2011) (citing Decision and Order on Zinniker Plaintiffs' Clarification Motion at 4, *Farm-to-Consumer Legal Def. Fund v. Wis. Dep't of Agric.*, No. 09-CV-6313 (Wis. Cir. Ct. Sept. 9, 2011)).

In the above cases, the government prevailed pre-trial on either motions for summary judgment or motions to dismiss.¹²⁰ It would follow, then, that the lower courts have largely agreed with the government's position that there is no fundamental right to food choice. The FDA clearly stated this position in a recent case in the Northern District of Iowa, writing in its brief to dismiss the case, "Plaintiffs' assertion of a 'fundamental right to their own bodily and physical health, which includes what foods they do and do not choose to consume for themselves and their families' is similarly unavailing because plaintiffs do not have a fundamental right to obtain any food they wish."¹²¹ This demonstrates that the FDA truly maintains that "[t]here is [n]o [g]eneralized [r]ight to [b]odily or [p]hysical [h]ealth."¹²²

When a Minnesota jury recently confronted the question, the case came out in the raw milk distributor's favor.¹²³ A Minnesota man was acquitted in September 2012 on "three misdemeanor counts of distributing unpasteurized milk, operating without a food handler's license and handling adulterated food."¹²⁴ Public backlash from raw milk cases caused the Wisconsin legislature to respond by introducing a bill to exempt certain dairy farms from raw milk regulations.¹²⁵ A bill was also introduced to lift the federal ban on interstate sales of raw milk in the U.S. House of Representatives.¹²⁶ Additionally, an amendment was proposed to Senate Farm Bill 3240 that would lift the ban.¹²⁷

Although the Supreme Court has never explicitly recognized that citizens have a right to eat foods of their choice, several Supreme Court justices have implied the right. Former Justice William O. Douglas suggested that the Ninth Amendment's protection of unenumerated rights includes within it "one's taste for food . . . [which] is certainly fundamental in our constitutional scheme—a scheme designed to keep government off the

120. *Farm-to-Consumer Legal Def. Fund v. Sebelius*, C 10-4018-MWB, 2012 WL 1079987, at *2 (N.D. Iowa Mar. 30, 2012); *Allgyer*, 2012 WL 355261, at *4; *Meadowsweet Dairy*, 898 N.Y.S.2d at 278.

121. Brief in Support, *supra* note 21, at 26.

122. *Id.*

123. See Associated Press, *Farmer Acquitted in Raw Milk Trial*, TRI-VALLEY DISPATCH (Sept. 26, 2012), http://www.trivalleycentral.com/trivalley_dispatch/farm_and_ranch/farmer-acquitted-in-raw-milk-trial/article_4d03fd64-075d-11e2-b762-0019bb2963f4.html.

124. *Id.*

125. S.B. 108, 100th Leg., 2011-2012 Reg. Sess. (Wis. 2011).

126. H.R. 1830, 112th Cong. (2011).

127. S. Amend. 2180, 112th Cong. (2012).

backs of people.”¹²⁸ Justice Douglas is not alone in mentioning the right to food choice. According to Justice Stephen Field, the right “to seek and procure food . . . is an element of that freedom which every American citizen claims as his birthright.”¹²⁹ Field does not go so far as to recognize a fundamental right to unfettered food choice; however, he distinguishes between food regulation and food bans.¹³⁰ A scholar discussing Field’s stance called regulation a “reasonable exercise of state police power,” but stated that complete bans of certain foods are unconstitutional.¹³¹ In a dissent, Justice Antonin Scalia recently suggested in dissent as an analogy for the protection of abortion rights, that the Court may preserve the “right to eat,” without officially declaring a right to starve.¹³²

The comments made by these justices suggest that lower courts’ categorical denial of a right to food choice may not receive unanimous support at the Supreme Court. By distinguishing food regulation and food bans, the Court may be able to reach a decision which satisfies both the FDA and private citizens. It may be difficult to distinguish the two because many food regulations may be so pervasive that they effectively amount to a food ban. To actually protect the right of citizens to choose any particular food, the Court must consider the effect of food regulations on the availability of food, not simply the facial validity of such regulations.

B. FDA Regulation of Raw Milk and Natural Foods: What’s on the Menu

The regulatory scheme is too vast and individual provisions are too numerous to recount exhaustively; however, in keeping with the theme of food choice as it applies to raw milk and organic foods, this Comment will address specific provisions. The provision banning sales of raw milk reads:

No person shall cause to be delivered into interstate commerce or shall sell, otherwise distribute, or hold for sale or other distribution after shipment in interstate commerce any milk or milk product in final package form for direct human consumption unless the product has been pasteurized or is made

128. *Olf v. E. Side Union High Sch. Dist.*, 404 U.S. 1042, 1044 (1972) (Douglas, J., dissenting).

129. *Powell v. Pennsylvania*, 127 U.S. 678, 692 (1888) (Field, J., dissenting).

130. Baylen J. Linnekin, *The “California Effect” & the Future of American Food: How California’s Growing Crackdown on Food & Agriculture Harms the State & the Nation*, 13 CHAP. L. REV. 357, 388 (2010).

131. *Id.*

132. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 980 n.1 (1992) (Scalia, J., dissenting).

from dairy ingredients (milk or milk products) that have all been pasteurized, except where alternative procedures to pasteurization are provided for by regulation¹³³

The Federal Register notification accompanying the final rule included the following finding: “Raw milk, no matter how carefully produced, may be unsafe.”¹³⁴ This statement has become the federal government’s refrain to support the proposition that raw milk is inherently dangerous.

The Federal Government also regulates other forms of “organic” and “natural” foods through the United States Department of Agriculture (USDA).¹³⁵ The USDA regulates the process of food production, rather than distribution.¹³⁶ In order for their foods to be certified USDA Organic, agricultural food producers must meet a host of statutorily imposed standards.¹³⁷ Producers wishing to be certified organic must submit an “organic plan” outlining plans for soil fertility, spreading of manure, livestock (if applicable), handling of crops, and management of wild crops, ensuring that the procedures are consistent with the organic certification process.¹³⁸ To be certified organic, foods must: (1) “have been produced and handled without the use of synthetic chemicals”; (2) “not be produced on land to which any prohibited substances, including synthetic chemicals, have been applied during the 3 years immediately preceding the harvest of the agricultural products”; and, (3) “be produced and handled in compliance with an organic plan agreed to by the producer and handler of such product and the certifying agent.”¹³⁹

The standards seem stringent, but they actually afford great discretion to USDA officials to agree to whatever organic plan they deem fit. The statutory scheme also contains an exemption for processed foods.¹⁴⁰ The Secretary may permit those processed foods with as little as 50% organic ingredients to be labeled organic.¹⁴¹ Critics have voiced concern that the standards are not sufficiently stringent and have permitted the food to be

133. 21 C.F.R. § 1240.61(a) (2009).

134. Requirements Affecting Raw Milk for Human Consumption in Interstate Commerce, 52 Fed. Reg. 29509-02 (Aug. 10, 1987).

135. See *Welcome to the National Organic Program*, FDA (Jan. 15, 2014), <http://www.ams.usda.gov/AMSv1.0/nop>.

136. See 7 U.S.C. §§ 6501-6523 (2012).

137. *Id.* § 6501.

138. *Id.* § 6513.

139. *Id.* § 6504(1)-(3).

140. *Id.* § 6505(c).

141. *Id.* § 6505(c)(1).

adulterated with non-organic substances.¹⁴² Studies have also indicated that the USDA certified organic foods have no significant health benefits compared to, and are not significantly safer than, foods produced through a non-organic agricultural process.¹⁴³

The superficially strict organic standards seem strange in light of these studies. Penalties for violating the Organic Certification procedures include a fine of up to \$10,000.¹⁴⁴ The image of apparent enforcement may simply be an attempt to satisfy an increasing number of citizens who care to know the ingredients and makeup of what they eat.

C. FDA Regulation Could Legally Reach onto Every Individual's Plate

The FDA maintains its position that raw milk should never be consumed,¹⁴⁵ but also claims that “with respect to the *interstate* sale and distribution of raw milk, the FDA has never taken, nor does it intend to take, enforcement action against an individual who purchased and transported raw milk across state lines solely for his or her own personal consumption.”¹⁴⁶ A simple statement of benevolent intent cannot automatically bestow constitutionality on a government regulation. The fact remains that the FDA may have the power to regulate personal consumption of raw milk, or any food, under the *Wickard v. Filburn* aggregation principle.¹⁴⁷ Simply stating that the FDA will not exercise the power does not suddenly make it disappear.

Two landmark constitutional cases address federal government regulation of personal, at-home consumption. The first case, *Wickard*, concerns wheat.¹⁴⁸ The aggregation principle was born in 1942, when the Supreme Court handed down the decision in *Wickard*, holding that the federal government could regulate personal production of wheat pursuant to the Commerce Clause.¹⁴⁹ The Court reasoned that the regulation was valid because in growing wheat for on-farm consumption, Mr. Filburn, the farmer, reduced the amount of other grain he would purchase on the open

142. See, e.g., Barbara H. Peterson, *USDA Certified Organic's Dirty Little Secret: Neotame*, FARM WARS, <http://farmwars.info/?p=4897> (last visited Feb. 28, 2014).

143. Carl K. Winter & Sarah F. Davis, *Organic Foods*, 71 J. OF FOOD SCI. R117, R123-24 (2006).

144. 7 U.S.C. § 6519 (2012).

145. Brief in Support, *supra* note 21, at 26.

146. *Food Safety and Raw Milk*, FDA (Mar. 22, 2013), <http://www.fda.gov/Food/FoodborneIllnessContaminants/BuyStoreServeSafeFood/ucm277854.htm>.

147. 317 U.S. 111, 127-28 (1942).

148. 317 U.S. 111.

149. *Id.* at 127-29.

market.¹⁵⁰ During the Great Depression, this would *in the aggregate* have a devastating effect on the fragile local economy.¹⁵¹ Mr. Filburn did not intend to sell the wheat he cultivated, so the Court relied on its aggregate effect on interstate commerce to permit the federal government to place limits on his production.¹⁵² In other words, if every farmer produced excess wheat and fed all their families with that wheat instead of purchasing feed on the open market, interstate commerce would be greatly affected.¹⁵³ That scenario seemed a rather unlikely one, but the outcome may have been the right one considering the Great Depression and the federal government's perspective that pervasive regulation of all industries was necessary to temper the effect of a failing economy on citizens.

The second personal consumption case stirs up the issue of marijuana consumption. The aggregation principle has also been used to justify federal government regulation in this context.¹⁵⁴ *Gonzalez v. Raich*, decided in 2005, upheld the federal government's authority to regulate personal consumption of marijuana, even when legal under state law for medicinal purposes.¹⁵⁵ The Court relied on the *Wickard* aggregation principle in its analysis, reasoning that the two cases were similar.¹⁵⁶ The Court analogized the cultivation of wheat to that of marijuana by defining both as "fungible commodit[ies] for which there is an established . . . interstate market."¹⁵⁷ The statute upheld in *Wickard* was the Agricultural Adjustment Act, which was designed to avoid wheat surpluses in interstate commerce.¹⁵⁸ The Court likened that purpose "to control [of] supply and demand of controlled substances in both lawful and unlawful drug markets."¹⁵⁹ In both cases, leaving the product in question "outside the regulatory scheme would have a *substantial influence* on price and market conditions."¹⁶⁰ The Court found this reasoning to be the rational basis upon which government regulation rested.¹⁶¹

150. *Id.* at 127.

151. *Id.*

152. *Id.*

153. *Id.* at 128.

154. *See also infra* Part VIII.

155. 545 U.S. 1, 33 (2005).

156. *Id.* at 18.

157. *Id.*

158. *Id.* at 18-19.

159. *Id.* at 19.

160. *Id.* (emphasis added).

161. *Id.*

Even with the inclusion of the word “substantial” in the standard for government action, *Wickard* and *Gonzalez* demonstrate that the government has a relatively low burden to bear in order to meet the test. The government need not prove an individual’s actions have a substantial effect on interstate commerce, but only that the action falls within a “class of activities” that have a substantial effect on interstate commerce in the aggregate.¹⁶² It would appear that, in light of *Wickard*, no outer boundary exists for food regulation. Mr. Filburn had no intention of participating in commerce, much less interstate commerce, but the Supreme Court authorized the government to regulate his personal wheat production. *Wickard* remains good law in an age where household food production is only a tiny fraction of what it once was. A modern connection between interstate commerce and producing or consuming raw milk solely within the confines of one’s own farm would be tenuous at best.

The FDA has an admittedly important interest in promoting public health and safety. In fact, that interest probably stands as one of the most important government responsibilities. And should the FDA ever decide to exercise its Commerce Clause power over personal household consumption of foods, it seems consumption of *any* food could be regulated. This could lead to shocking outcomes. The federal government might reach into individuals’ homes and control activity without regard to the right to privacy. This could lead to government monitoring of not only the foods that are available for consumption, but also which foods are actually being consumed, and by whom. This could extend to government mandated diet plans. After all, it is widely known that it is not “healthy” to be overweight.¹⁶³ And it would promote public health if the federal government required a 1200 calorie per day diet for every citizen.¹⁶⁴ Of course, it seems absurd to extrapolate to that degree, but the power remains in the hands of the federal government until the issue comes before the Supreme Court.

162. *Id.* at 17.

163. *See generally* WORLD HEALTH ORG., OBESITY: PREVENTING AND MANAGING THE GLOBAL EPIDEMIC 4 (2000).

164. Food regulation in schools presents a situation similar to this one. While not within the scope of this Comment, school lunch programs are designed to ensure that schools provide children an adequate level of nutrition while the children are at school. *See* 7 C.F.R. §§ 210, 220 (2013).

V. Authority to Enforce Regulations: Too Much Confiscating over Spilled Milk

With such extreme outcomes being a lurking possibility, the federal government's authority to take action pursuant to food regulations becomes important. The United States Code prohibits acts not in conformity with the FDA regulations, including selling, distributing, or manufacturing adulterated food.¹⁶⁵ Federal law also prohibits mislabeling food.¹⁶⁶ The Surgeon General has the authority to enforce regulations as he deems necessary in order to "prevent the introduction, transmission, or spread of communicable diseases . . . from one State or possession into any other State or possession."¹⁶⁷ This includes "inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary."¹⁶⁸ But the law does not provide for the detention of individuals "except for the purpose of preventing the introduction, transmission, or spread of such communicable diseases as may be specified from time to time in Executive orders of the President."¹⁶⁹

The Food, Drug, and Cosmetic Act gives the federal government unparalleled authority to search and arrest.¹⁷⁰ The Act furnishes the Secretary of the Department of Health and Human Services with the power to conduct investigations through FDA officers and employees.¹⁷¹ Any FDA officer or employee is authorized to carry firearms and execute and serve search and arrest warrants.¹⁷² Under certain circumstances, those officers or employees can seize food (and drugs or cosmetics) without a warrant or hearing.¹⁷³ If an employee has reasonable grounds to believe an item may be subject to seizure, the employee can institute seizure proceedings without a warrant.¹⁷⁴ However, the statutory grant of power leaves ambiguous the "reasonable grounds" requirement for seizure.

165. 21 U.S.C. § 331 (2012).

166. *Id.*

167. 42 U.S.C. § 264(a) (2012).

168. *Id.*

169. *Id.* § 264(b).

170. *See* 21 U.S.C. § 334.

171. *Id.* § 372(a)(1).

172. *Id.* § 372(e)(1)-(2).

173. *Id.* § 372(e)(5).

174. *Id.*

The FDA Investigations Operations Manual summarizes agents' statutory authority in conducting investigations and seizing property.¹⁷⁵ The manual states that officers or agents may enter and inspect "at reasonable times, within reasonable limits, and in a reasonable manner, establishments or vehicles being used to process, hold or transport food."¹⁷⁶ The manual further states that "reasonable" is not statutorily defined, but that the FDA maintains that it means actions that are "reasonably necessary to achieve the objective of the inspection."¹⁷⁷ As of the 2002 passage of the "Bioterrorism Act,"¹⁷⁸ FDA officers and employees have the authority to search and seize food records if the Secretary has a reasonable belief that an article of food poses a threat to human health and the records are "necessary to assist" the Secretary in making a determination.¹⁷⁹ The manual indicates that the "FDA plans to carry out its authority to inspect all records . . . upon presentation of appropriate credentials and a written notice at reasonable times, within reasonable limits, and [in] a reasonable manner."¹⁸⁰ In sum, the statutes and regulations governing FDA actions afford great discretion in allowing agents to determine what is "reasonable" under the regulations.

The seizure process is *in rem*, so a suit is brought against the goods themselves.¹⁸¹ In the civil suit, the FDA's burden of proof is the typical preponderance of the evidence.¹⁸² The FDA also has the statutory authority to impose criminal penalties against individuals pursuant to section 333 of the Food, Drug, and Cosmetic Act.¹⁸³ Courts have long afforded great discretion to the FDA in making the decision to criminally prosecute individuals.¹⁸⁴ That discretion is bolstered by the judicial interpretation of

175. See FDA, INVESTIGATIONS OPERATIONS MANUAL 39-46 (2013) [hereinafter OPERATIONS MANUAL], available at <http://www.fda.gov/downloads/ICECI/Inspections/IOM/UCM123504.pdf>.

176. *Id.* at 40.

177. *Id.*

178. Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, 116 Stat. 594 (codified in scattered sections of 7 U.S.C., 21 U.S.C., and 42 U.S.C.).

179. OPERATIONS MANUAL, *supra* note 175, at 40.

180. *Id.*

181. See, e.g., *Four Hundred and Forty-Three Cans of Frozen Egg Product v. United States*, 226 U.S. 172, 183-84 (1912); *Dainty-Maid, Inc. v. United States*, 216 F.2d 668, 670 (6th Cir. 1954).

182. *United States v. Food*, 2998 Cases, 64 F.3d 984, 989 (5th Cir. 1995) (holding that under 21 U.S.C. § 334 the standard is "a preponderance of the evidence").

183. 21 U.S.C. § 333 (2012).

184. See *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001) (noting that the authority to deter fraud through, among other means, criminal prosecution rests with the

the FDCA as pre-empting any private enforcement actions of regulatory violations.¹⁸⁵ The FDA holds complete discretion to investigate and prosecute for regulatory violations.¹⁸⁶

In 2012, a bill¹⁸⁷ was introduced in the United States Senate to place stricter limits on the FDA's power and discretion to search and seize under the Food and Drug Administration Safety and Innovation Act,¹⁸⁸ the proposed successor to the Food, Drug, and Cosmetic Act. Although it failed to pass, the proposed amendment sought to prohibit FDA employees from carrying firearms and making arrests without warrants.¹⁸⁹ Additionally, it seriously limited the FDA's law enforcement power.¹⁹⁰ More importantly, it may have prevented incidents like the raids on Allgyer, the Amish farmer, and the owners of organic food cooperatives. However, only fifteen senators voted against tabling the amendment and putting off the vote until a later date.¹⁹¹

The regulatory scheme under which the FDA operates today affords individual agents a large amount of discretion. Although the FDA does not currently have the statutory authority to prosecute individuals for consuming raw milk, or any other type of food for that matter, prosecuting raw milk production and sale infringes the right of potential purchasers to choose to consume it.

VI. State Regulation of Raw Milk: Separating the Cream from the Crop

Federal regulations only ban the sale of raw milk in *interstate* commerce, but *intrastate* regulations are left up to the individual states. Forty states

FDA as part of a "delicate balance of statutory objectives"); *Heckler v. Chaney*, 470 U.S. 821, 835 (1985) (finding that the FDA has "complete discretion" in deciding "how and when [its enforcement tools] should be exercised"); *United States v. Sullivan*, 332 U.S. 689, 694 (1948) (stating that the agency has "rather broad discretion" to act). Though the discussion of discretion in *Buckman Co.* and *Sullivan* dealt with whether the court may *require* the FDA to bring suit for regulatory violations, the broad discretion can also swing in favor of the FDA's ability to criminally prosecute whoever is deemed to be in violation. *See* 21 U.S.C. § 336 (2012) (granting broad discretion to prosecute minor violations).

185. *Buckman Co.*, 531 U.S. at 348.

186. *See* 21 U.S.C. §§ 335, 336.

187. S. Amend. 2143, 112th Cong. (2012).

188. Pub. L. No. 112-144, 126 Stat. 993 (2012).

189. S. Amend. 2143, 112th Cong. (2012).

190. The amendment would have prohibited FDA employees from carrying firearms and making arrests without warrants. *Id.* The amendment also would have adjusted the mens rea requirement to for FDCA violations to knowing and willful. *Id.*

191. *See* 158 CONG. REC. S3562 (2012).

allow the sale of raw milk with varying degrees of regulation.¹⁹² Fifteen states prohibit retail sales and only allow raw milk sales from farms directly to consumers.¹⁹³ Eleven states, including California, permit retail sales.¹⁹⁴ Eight states permit “herd shares,” agreements whereby consumers lease cows and a farmer produces the milk.¹⁹⁵ Four states have no laws regarding herd shares, indicating they are presumably legal until their respective legislatures or judiciaries take action prohibiting such arrangements.¹⁹⁶ Six different states provide an interesting loophole by permitting the sale of raw milk as “pet food.”¹⁹⁷ Washington, D.C. and the remaining seventeen states have banned raw milk sales altogether.¹⁹⁸ Inconsistent state regulation makes for a multi-faceted analysis, but California regulations consistently rise to the top of the bucket as the regulatory gold standard in various contexts. To illustrate the range of various state regulations, the following sections discuss regulations recently passed in California and New York.

A. California’s Model Provides the Grade A Standard for Regulation

Many look to California as the leading state in organic food certification and regulation.¹⁹⁹ California necessarily must be first in the nation in food regulation because “California’s agricultural output is so massive that its value dwarfs that of all but about a half-dozen countries in the world.”²⁰⁰ California currently allows the intrastate sale of raw milk but requires warning labels.²⁰¹ However, the regulatory tide in California may be changing.²⁰²

In 2007, the California government promulgated stricter regulations for bacteria levels found in milk.²⁰³ A year later, then-Governor Schwarzenegger vetoed a bill that would have lessened the regulatory

192. *Raw Milk Facts State by State*, REAL RAW MILK FACTS, <http://www.realrawmilkfacts.com/raw-milk-regulations> (last visited Feb. 23, 2014).

193. *Id.*

194. *State-by-State Review of Raw Milks Laws*, FARM-TO-CONSUMER LEGAL DEF. FUND (June 21, 2013), http://www.farmtoconsumer.org/raw_milk_map.htm.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. See Linnekin, *supra* note 127, at 372-73.

200. *Id.* at 359.

201. CAL. FOOD & AGRIC. CODE § 35891 (2014); CAL. CODE REGS. tit. 17, § 11380 (2014).

202. Linnekin, *supra* note 127, at 371.

203. *Id.* at 371-72.

burden on raw milk producers by establishing different and presumably more lenient standards for bacteria levels found in raw milk versus pasteurized milk.²⁰⁴ Increasing scrutiny on raw milk, exemplified by this veto, came after four children who drank raw milk became ill, though the illness was never traced to the milk.²⁰⁵ Although an estimated 100,000 people in the state drink raw milk every week,²⁰⁶ restrictions continue to tighten.²⁰⁷

Stricter regulations in California will likely lead to stricter regulations in competing states across the country.²⁰⁸ Not only is California the flagship state for food production, but competing political candidates in other jurisdictions seeking to appease voters will not want to appear lagging in food safety regulation. For example, in 1970, the federal government passed nationwide automobile emissions standards, but allowed only California to create stricter standards.²⁰⁹ Then, twenty years later, the federal government chose to follow the stricter California emissions standards.²¹⁰ The same pattern may be followed with food regulation and restriction of individual consumption.

B. New York Tightens Citizens' Belts

The so-called food crackdown has increased nationwide in recent years. In 2011, New York City became the first American city to require full calorie disclosure on restaurant menus.²¹¹ The regulation in its originally drafted form was not constitutionally sound and went through many iterations before it passed.²¹² A complaint was quickly filed in federal court challenging the constitutional validity of the regulation on First

204. *Id.* at 371.

205. *Id.* at 371-72.

206. *Id.* at 371.

207. Gosia Wozniacka, *Raw Milk Regulations Tighten as Demand Increases*, HUFFINGTON POST (Aug. 5, 2011), http://www.huffingtonpost.com/2011/08/05/raw-milk-regulations-tighen_n_919177.html (stating that three individuals who ran a herd share were arrested); Press Release, Cal. Dep't of Food & Agric., New Coliform Bacteria Standard for California Raw Milk Producers (2007), available at http://www.cdffa.ca.gov/egov/Press_Releases/Press_Release.asp?PRnum=07-090.

208. *Id.* at 374-79 (discussing the "California effect" on food regulation).

209. *Id.* at 373.

210. *Id.*

211. Victoria Bettina Browne, Note, *The Rules of Consumption: The Promise and Peril of Federal Emulation of the Big Apple's Food Laws*, 76 BROOK. L. REV. 1049 (2011).

212. *See id.* at 1051-56.

Amendment and preemption grounds.²¹³ The district court found the regulation to be preempted by federal law.²¹⁴ This ruling prompted the city to re-work the regulation.²¹⁵ During the second suit, neither argument was successful and the district court found in favor of the City, upholding the regulation.²¹⁶ The Second Circuit affirmed on appeal.²¹⁷ Both courts found unavailing the First Amendment argument, which advocated for a stricter standard of scrutiny for menu labeling, and adopted the rational basis review.²¹⁸ The case did not reach the Supreme Court.²¹⁹

A law such as the New York labeling law does not necessarily imperil an individual's right to choose which foods he consumes because such laws simply promote education to inform food choices. However, regulation requiring more than mere labeling may tread on unconstitutional waters. Laws that go beyond mere information disclosure are much more likely to infringe upon individual constitutional rights.²²⁰ Three New York City active initiatives prove worrisome: first, New York City was the first to pass a trans fat ban;²²¹ second, New York City "recently commenced a sodium reduction campaign" that spread nationwide;²²² and third, New York City advanced "its newest initiative banning the use of food stamps to purchase sugary drinks."²²³ These "health initiatives" come perilously close to directing what citizens can eat by limiting the possible range of choices. The New York City initiatives certainly trend in that direction, but the nationwide movement toward increased food regulation, catalyzed by the New York regulation of food, is more troubling.

213. Brent Bernell, *The History and Impact of the New York City Menu Labeling Law*, 65 FOOD & DRUG L.J. 839, 848-49 (2010).

214. *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 509 F. Supp. 2d 351, 363 (S.D.N.Y. 2007).

215. Bernell, *supra* note 213, at 852-54.

216. *Id.* at 854.

217. *Id.* at 859.

218. *Id.* at 855-56, 861.

219. *Id.* at 861.

220. *See Browne, supra* note 211, at 1082.

221. *Id.* at 1081.

222. *Id.* at 1081-82.

223. *Id.* at 1082.

VII. Outcomes When the Government Chooses What's on the Menu

A. Public Choice Architecture: Catching More Flies with Honey

The New York regulatory scheme attempts to help citizens make those choices that policymakers think are healthier for them. Some advocate for this kind of new paternalism that promotes the government making health choices on behalf of its citizens. The concept of this extensive government architecture of citizens' food choices is called a "nudge."²²⁴

The authors of *Nudge: Improving Decisions About Health, Wealth, and Happiness*, call the concept "libertarian paternalism."²²⁵ Citizens are free to choose, but government policy defines the universe of choices.²²⁶ The New York regulations requiring publication of nutrition facts could be considered a nudge. Proponents of this theory suggest their concept promotes freedom of choice,²²⁷ and the New York policies seem to support this goal by promoting educated food choices.²²⁸ However, the nudge theory promoted by the authors goes far beyond the boundaries of the New York food labeling laws. Their expansive form of libertarian paternalism requires that private and public choice architects "attempt[] to move people in directions that will make their *lives better*."²²⁹ And under this regime, the government decides what "better" means.

Under the theory, complete bans on certain foods are not nudges, but placing fruit (instead of candy) in the impulse basket at the store is.²³⁰ Thus, the complete ban on sale and distribution of raw milk is not a nudge. In fact, it is hard to imagine a nudge that would satisfy the traditional theory of libertarian paternalism. As it stands, the FDA is not nudging citizens; it is completely banning certain food options. The FDA maintains its position that it promulgates regulations solely for the purpose of protecting citizens' health and safety.²³¹

These regulatory limits on foods allowed to circulate in interstate commerce do prevent corporate food distributors from selling contaminated food to consumers. This certainly was necessary at the inception of food

224. RICHARD H. THALER & CASS SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 6 (2008).

225. *Id.* at 4-5.

226. *See id.* at 5.

227. *Id.*

228. *See generally* Browne, *supra* note 211.

229. THALER & SUNSTEIN, *supra* note 224, at 6 (emphasis added).

230. *Id.*

231. *See* SHEEHAN, *supra* note 104.

regulation in the early twentieth century.²³² The paternalistic approach to food regulation is not as necessary in the internet age where consumers have access to a wealth of information regarding food and instantaneous reviews regarding food products. Even the paternalistic approach has somewhat manipulative aspects. The nudge theory inevitably requires there to be someone nudging (i.e., the policymaker, the choice architect). This could be seen not as simply guiding a person's choices, but altogether eliminating them.²³³ A principle problem lies in the presumption that a mysterious appointed policymaker would understand the peoples' desires more keenly than the people would themselves.²³⁴ The idea that a distant person sets up a certain universe of choices, designed to ultimately lead citizens to choose a certain outcome, seems more manipulative and controlling than a ban on certain foods. The nudge theory would vastly diminish transparency of the way government policy makers decide to regulate food and other aspects of citizens' lives.

Outside of the food-choice context, the nudge theory has been tested in other countries and reportedly "works."²³⁵ British government officials created a special government unit to run trials employing the nudge theory.²³⁶ In one trial, the Department of Revenue and Customs sent letters to 140,000 people stressing that paying taxes on time was a social norm and that 90% of British people pay taxes on time.²³⁷ These letters increased the response rate and could help the Department of Revenue and Customs collect £160 million more in tax revenue.²³⁸ One city council saved £240,000 by simply changing the *tone* of its tax letters.²³⁹ The obvious purpose behind the trials in Great Britain was to increase revenue, and none of the trials changed the manner in which food was regulated or presented to consumers. However, the same approach could be employed regarding food, or really any aspect of life the government seeks to change. The problem with the nudge theory is the blatant lack of government

232. See *supra* Part II.

233. Henry Farrell & Cosma Shalizi, 'Nudge' Policies Are Another Name for Coercion, *NEWSIDENTIST*, Nov. 9, 2011, at 28, 28, available at <http://www.newscientist.com/article/mg21228376.500-nudge-policies-are-another-name-for-coercion.html#UxCxheNdXTTo>.

234. *Id.*

235. *Nudge Theory Trials 'Are Working' Say Officials*, BBC (Feb. 8, 2012), <http://www.bbc.co.uk/news/uk-politics-16943729>.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

accountability to the people because the entire point of the process is that those being “nudged” are unaware that their choices are being influenced.

While the constitutionality of the nudge theory is an entirely different issue, the fact remains that federal and state governments are doing far more than nudging. They have made choices on behalf of Americans regarding what they should or should not consume for nutrition, without their consent. The ever-increasing FDA regulation has not created a perfect, adulteration free food supply.²⁴⁰ At least some of the increased quality of food products over the last century is undoubtedly the result of government oversight. That oversight should not go away, as the health and safety of American citizens demands at least some degree of food safety guidelines. But perhaps the complete ban of certain foods, the ability to seize food from those interested in the qualities the government forbids, and arresting citizens without warrants, have taken food regulation to the point of impermissibly infringing on individuals’ right to choose what they put into their own bodies.

B. The FDA Says Mother Doesn’t Know Best: The Road to the Raw Milk Ban

The FDA asserts that a person has no fundamental right to have access to the certain foods and also no fundamental “generalized right to bodily or physical health.”²⁴¹ However, even if such a right exists, the FDA contends that its regulations would not impermissibly infringe on that right because they *promote* physical health.²⁴² In fact, the FDA was *ordered* to promulgate a rule banning the sale of raw milk in interstate commerce because *not* promulgating the rule was held to be “arbitrary and capricious.”²⁴³

In 1984, two major non-profit organizations petitioned the Secretary of Health and Human Services to ban all interstate sales of raw milk.²⁴⁴ This came more than ten years after the FDA began investigating the health and safety of raw milk.²⁴⁵ The FDA finally concluded that “a federal ban would not be the most effective or appropriate means of dealing with the health

240. See generally RENÉE JOHNSON, CONG. RESEARCH SERV., R43358, FOOD FRAUD AND “ECONOMICALLY MOTIVATED ADULTERATION” OF FOOD AND FOOD INGREDIENTS (2014), available at <http://www.fas.org/sgp/crs/misc/R43358.pdf>.

241. Brief in Support, *supra* note 21, at 26.

242. *Id.*

243. Pub. Citizen v. Heckler, 653 F. Supp. 1229, 1238 (D.D.C. 1986).

244. *Id.* at 1233.

245. *Id.* at 1232.

problems posed by unpasteurized milk and milk products.²⁴⁶ The District Court ordered the Secretary of Health and Human Services to promulgate such a regulation after the Secretary refused to engage in rulemaking in the face of years of proceedings and inquiries.²⁴⁷ The FDA has long relied on a study by the Center for Disease Control, conducted between 1974 and 1982 during the initial determination process of whether to ban raw milk, as justification for shutting down farmers and producers of raw milk.²⁴⁸ The study found that outbreaks of two serious illnesses were caused by raw milk²⁴⁹ and there was no conceivable way to safely label raw milk to warn of the dangers.²⁵⁰

However, the health benefits of raw milk have been lauded to alleviate ailments from asthma to autism.²⁵¹ The GABRIELA study, conducted in rural regions of Germany, Austria, and Switzerland on over 8000 school-aged children, demonstrated a correlation between raw milk consumption and reduction of asthma and allergy related symptoms.²⁵² Raw milk consumption has also been promoted through the recent local food movement.²⁵³ Many people want to eat whole, raw foods because they believe the food to be more nutritious in its pre-processed form.²⁵⁴

Not only does raw milk have health benefits, but pasteurized milk may have negative effects on health. Pasteurized milk can also cause outbreaks of illness.²⁵⁵ In comparing outbreaks of illness from 1998 to today, pasteurized milk caused a comparable number of illnesses.²⁵⁶ Differing scientific studies may be cause for reevaluation of the ban on raw milk.

246. *Id.* at 1235 (citing FDA Denial Letter of Mar. 15, 1985).

247. *Id.* at 1242.

248. *See id.* at 1232-33.

249. *Id.* at 1232 n.3.

250. *Id.* at 1233.

251. RON SCHMID, *THE UNTOLD STORY OF MILK* 325-26 (2009).

252. Georg Loss et al., *The Protective Effect of Farm Milk Consumption on Childhood Asthma and Atopy: The GABRIELA Study*, 28 J. OF ALLERGY & CLINICAL IMMUNOLOGY 766, 768 (2011). A different study purports that there are no health benefits to consuming unpasteurized milk. Christopher J. Cifelli et al., *Pasteurization: Implications for Food Safety and Nutrition*, 45 NUTRITION TODAY 207, 207 (2010).

253. Maureen O'Hagan, *Is Raw, Unpasteurized Milk Safe?*, SEATTLE TIMES (Mar. 20, 2010), http://seattletimes.com/html/localnews/2011399591_rawmilk21m.html.

254. *Id.*

255. *Outbreaks And Illnesses from Raw and Pasteurized Milk And Dairy Products, 1998-Present*, REAL RAW MILK FACTS (Apr. 29, 2012), <http://www.realrawmilkfacts.com/raw-milk-news/story/outbreaks-and-illnesses-from-raw-and-pasteurized-milk-and-dairy-products-19/>.

256. *Id.*

C. FDA-Approved Foods Linked to Disease: Citizens Put GMOs on the Chopping Block

The FDA's promotion of other foods linked to disease seems inconsistent with its ban on raw milk. The FDA considers some foods linked to disease to be perfectly safe for human consumption, but perhaps this is because raw milk causes immediate symptoms and illnesses from other foods are slow-growing.²⁵⁷ Foods made from genetically modified organisms (GMOs) make up about 80% of processed foods available in the grocery store, according to the Grocery Manufacturers Association.²⁵⁸ GMO foods are produced and widely distributed by Monsanto, one of the largest seed producers in the United States.²⁵⁹

Legislation regarding mandatory labeling of GMO foods has been proposed but has yet to be successful.²⁶⁰ Despite their harmful health effects, the U.S. Senate voted against a bill that would require labeling of GMO foods.²⁶¹ California voters petitioned the state to require labeling of GMO foods in Proposition 37 as part of their 2012 state questions.²⁶² If passed, the legislation would have required all genetically engineered foods to be labeled, as well as *banned* the labeling of GMO foods as "natural."²⁶³ The proposed requirement had far-reaching implications, which may be

257. Illnesses caused by raw milk include food poisoning or E. coli. *Outbreaks and Illnesses from Raw and Pasteurized Milk and Dairy Products, 1998-Present*, REAL RAW MILK FACTS (Apr. 29, 2012), <http://www.realrawmilkfacts.com/raw-milk-news/story/outbreaks-and-illnesses-from-raw-and-pasteurized-milk-and-dairy-products-19/>. On the other hand, consumption of GMOs has long term detrimental health effects such as development of cancer. A ninety-day study linked consumption of GMO corn in rats to organ failure. See Tom Philpott, *Longest-Running GMO Safety Study Finds Tumors in Rats*, MOTHER EARTH NEWS (Apr. 2013), <http://www.motherearthnews.com/natural-health/gmo-safety-zmgz13amzsto.aspx?PageId=2#axzz2wXXMo9nP>.

258. Emily Main, *How Common Is Genetically Altered Food? Go GMO Free and Find Out*, RODALE NEWS, June 13, 2011, <http://www.rodale.com/genetically-modified-organisms-foods>.

259. Carey Gillam, *Food Companies Petitioned to Ban New Monsanto GMO Corn*, REUTERS, Oct. 7, 2011, <http://www.reuters.com/article/2011/10/27/us-food-monsanto-idUSTRE79Q71O20111027>.

260. Rady Ananda, *US Senate Votes Against GMO Food Labels 73-26*, FOOD FREEDOM NEWS, June 23, 2012, <http://foodfreedomgroup.com/2012/06/23/senate-votes-no-gmo-food-labels/>.

261. *Id.*

262. Alicia Chang, *Prop. 37 Will Test California's Appetite for GMO Foods*, HUFFINGTON POST, Oct. 6, 2012, http://www.huffingtonpost.com/2012/10/07/prop-37-california-gmo-food_n_1945106.html.

263. See S. Amend. 2310, 112th Cong. (2012).

why companies like Monsanto (one of the largest producers of GMO foods) spent millions of dollars fighting it.²⁶⁴ Because other states and the federal government tend to look to California as a model for regulatory standards, the effects of an approved proposition could have spread nationwide.²⁶⁵ The labeling requirement seems similar to that requiring calorie disclosure in New York, but the opposition in California seems much steeper. The proposition did not pass in California, but some hope remains that it will again be on the ballot in the next election cycle,²⁶⁶ particularly because the proposition only failed by 6%.²⁶⁷

The FDA similarly permits other toxic foods to be sold in interstate commerce. Mercury levels in fish have also long been of concern. It is nearly impossible to purchase fish that does not contain mercury.²⁶⁸ Mercury consumption can damage organs and lead to learning disabilities in children.²⁶⁹ Processed foods, available at every turn in the supermarket, have also been linked to disease. A British study of nearly 7000 pancreatic cancer cases found that for every fifty-gram serving of processed meat consumed, or about one link of sausage, the likelihood of contracting pancreatic cancer increased 19%.²⁷⁰ High fructose corn syrup, found in a wide variety of processed foods, has been linked to obesity.²⁷¹ Some studies have even suggested that high fructose corn syrup has *addictive* properties.²⁷²

264. Chang, *supra* note 262 (“International food and chemical conglomerates, including Monsanto Co. and DuPont Co., have contributed about \$35 million to defeat Proposition 37 on the November ballot.”).

265. *See supra* Part VI.A.

266. John P. Anderson, *Prop 37 Failed, Now What? Ways to Avoid GMO Foods and Support Sustainable Agriculture*, SAN DIEGO FREE PRESS, Nov. 11, 2012, <http://sandiegofree press.org/2012/11/prop-37-failed-now-what-ways-to-avoid-gmo-foods-and-support-sustainable-agriculture/>.

267. *Id.*

268. Dina Cappiello, *Federal Study Shows Mercury in Fish Widespread, Inescapable*, HUFFINGTON POST, Oct. 27, 2011, http://www.huffingtonpost.com/2009/08/20/federal-study-shows-mercu_n_263741.html.

269. *Id.*

270. S.C. Larsson & A. Wolk, *Red and Processed Meat Consumption and Risk of Pancreatic Cancer: Meta-Analysis of Prospective Studies*, 106 BRIT. J. OF CANCER 603, 604 (2012).

271. Jennifer K. Nelson, *High Fructose Corn Syrup: Any Health Concerns?*, MAYO CLINIC (Sept. 27, 2012), <http://www.mayoclinic.com/health/high-fructose-corn-syrup/AN01588>.

272. Marie-Hélène Lyle, *The Reclassification of Sugar as a Drug*, LETHBRIDGE UNDERGRADUATE RES. J. (2006), <http://www.lurj.org/article.php/vol1n1/sugar.xml>.

Other countries see no need to regulate food consumption as extensively as the United States. In France, raw milk is sold in vending machines.²⁷³ The sale, however, has strict licensing requirements.²⁷⁴ Though refrigeration of eggs is required in the United States,²⁷⁵ there is no legal requirement to refrigerate farm eggs in the United Kingdom.²⁷⁶ Differing international policies concerning food regulation demonstrate that strict bans on certain foods may be unnecessary. Raw milk's widespread availability in France illustrates an understanding that it may have positive properties, or at least implies the government's acquiescence to citizens choosing for themselves.

The foregoing discussion of the health risks of food currently available in the U.S. market is not meant to promote further food regulation. On the contrary, it is intended to demonstrate inconsistencies in the pattern of regulation. The ban on raw milk seems strange in light of diseases caused by so many other foods available on the market. Citizens are free to consume foods that contribute to obesity and cancer. Citizens have the right to make health choices that negatively impact health, as demonstrated in cases like *Cruzan*, because individuals possess a right to be free from governmental intrusion concerning their bodies.²⁷⁷ If an individual wants to consume raw milk, knowing the dangers, then he will necessarily suffer the consequences just as a person eating only processed foods may eventually be diagnosed with cancer. The raw milk ban and proposed New York ban on the sale of sugary drinks seem more like government distrust of consumers' ability to make their own educated food choice decisions. No person would support government enforced diet plans, but the current regulatory environment may provide authority for the federal government to achieve such absurd results.

273. Thebovine, *Raw Milk Vending Machines in Europe*, THE BOVINE (Jan. 27, 2011, 2:32 PM), <https://thebovine.wordpress.com/2011/01/27/raw-milk-vending-machines-in-europe/>.

274. *Id.*

275. Julia Moskin, *Straight from the Home Coop*, N.Y. TIMES, Apr. 3, 2012, http://www.nytimes.com/2012/04/04/dining/hatching-your-own-batch-of-eggs.html?page=1&_r=1.

276. Dr. Mercola, *Americans – Why Do You Keep Refrigerating Your Eggs?*, MERCOLA.COM (Dec. 7, 2013), <http://articles.mercola.com/sites/articles/archive/2013/12/07/refrigerating-chicken-eggs.aspx>.

277. *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 269 (1990).

*VIII. The Smell of Fundamental Rights in the Kitchen May Waft Through
the Rest of the House*

Recognizing the fundamental right to consume whatever one desires may have broader implications than just ingestion of food. If people have the right to consume whatever foods they want, do they then possess the general right to consume *anything* they wish to consume? The health choice argument has often been raised in cases involving drug use, especially marijuana.

State courts have systematically declared that there is no fundamental right to smoke marijuana.²⁷⁸ The U.S. Supreme Court has held that the right to privacy protected by the federal Constitution does not extend to the use of marijuana in the home.²⁷⁹ The right to pursue health has also been held not to encompass a right to use marijuana.²⁸⁰ “In pursuing one’s health, an individual has a fundamental right to obtain and reject medical treatment. But, this right does not extend to give a patient a fundamental right to use any drug, regardless of its legality.”²⁸¹ The Montana Supreme Court held that regulation of marijuana as a medication falls within the government’s interest in protecting public health.²⁸²

The analogy can be drawn that because a person has a fundamental right to consume a food that may be harmful to his body, he should have the fundamental right to consume drugs that are harmful to him. However, such a suggestion lacks merit because the Supreme Court could easily narrow the scope of a holding recognizing the fundamental right to food choice to apply only to foods, not other consumable substances. Marijuana and other hallucinogenic drugs impair the ability to absorb and retain information, affect short term memory and verbal skills, and have a depressant effect on

278. *E.g.*, *State v. Stoner*, 2012 MT 248, 365 Mont. 465, 285 P.3d 402; *Ill. NORML, Inc. v. Scott*, 383 N.E.2d 1330 (Ill. App. Ct. 1978); *Laird v. State*, 342 So. 2d 962 (Fla. 1977). *Contra* *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975) (“Th[e] right to privacy would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home unless the state can meet its substantial burden and show that proscription of possession of marijuana in the home is supportable by achievement of a legitimate state interest.”).

279. *Gonzalez v. Raich*, 545 U.S. 1, 19 (2005).

280. *Mont. Cannabis Indus. Ass’n v. State*, 2012 MT 201, ¶ 23, 366 Mont. 224, 286 P.3d 1161.

281. *Id.* (internal citations omitted).

282. *Id.* ¶ 24.

the body.²⁸³ These conditions have effects on people other than the one consuming the substance, the typical example being traffic accidents caused by slow reaction time. This is not so with consumption of foods. Consuming the illegal substance, raw milk, makes a person no more likely to run into another car than consuming the legal substance, such as processed lunch meat. While the argument exists, it is not a strong one for denying citizens the right to consume the foods they wish to consume without government intrusion.

IX. The Constitutional Test

A. Supreme Court Constitutional Rights Analyses: Recipe for Confusion

But even if Americans consider their choice to consume the foods they choose to be a fundamental right, will the Court agree? In evaluating whether government action has violated a constitutional right, the Supreme Court employs various tests and analyses. If the right to choose what one consumes is deemed a fundamental right by the Supreme Court, the Court must decide which framework is appropriate to analyze government action that infringes on the right.

The first indication that state actions could be categorized and analyzed under differing levels of judicial scrutiny appeared in *United States v. Carolene Products Co.*'s now infamous footnote 4.²⁸⁴ The case also concerned the extent to which the government food regulation involved was an appropriate exercise of Commerce Clause power.²⁸⁵ The Court stated that legislation regulating "ordinary commercial transactions" is presumed constitutional unless there is no "rational basis within the knowledge and experience of legislators."²⁸⁶ Footnote 4 is a note to this statement, indicating that the Court may more closely scrutinize government action, and forego the presumption of its constitutionality, if the individual interest is constitutionally substantial.²⁸⁷ The federal regulation at issue in the case prohibited the sale across interstate lines of "filled milk," a milk compounded with oil or fat.²⁸⁸ The Court reasoned that evidence "of the

283. E.g., Jenna Bergen, *Five Reasons to Be Careful About Cannabis*, PHILADELPHIA (June 25, 2010), <http://www.phillymag.com/articles/five-reasons-to-be-careful-about-cannabis/>.

284. *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

285. *Id.* at 145-46.

286. *Id.* at 152.

287. *Id.* at 152 n.4.

288. *Id.* at 145-46.

danger to the public health from the general consumption of foods which have been stripped of elements essential to the maintenance of health” provided a rational basis upon which to pass the legislation.²⁸⁹ The difference between *Carolene Products* and the state of food regulation today lies in the extensive regulation of foods that have not been stripped of nutritive elements at all. Raw milk is a “whole food” free from processing or adulteration, yet federal, and many state, governments ban it.²⁹⁰ The reasoning in *Carolene Products* cannot support such action.

The rational basis test affords great deference to the legislature by requiring only that state action be rationally related to a legitimate government purpose.²⁹¹ This is a low hurdle for state to overcome; the Court has explained that “if there is any reasonably conceivable state of facts that could provide a rational basis,” a law passes the rational basis test.²⁹² The rational basis test should not be used when the challenged law risks infringing upon constitutional liberties.²⁹³ Therefore, the rational basis test is the incorrect test to analyze issues arising from food regulation that may impermissibly infringe on citizens’ rights to choose their diets.

A modified form of the rational basis test has sometimes been used in the context of the Equal Protection Clause of the Fourteenth Amendment.²⁹⁴ In those contexts, the Court analyzes issues using “rational basis with bite” for laws creating classifications based on length of residency (i.e., in a right to travel context),²⁹⁵ mental disability,²⁹⁶ and most recently sexual orientation.²⁹⁷ Though the Court states it employs the rational basis test in these contexts, it strikes down laws that would have been upheld under a

289. *Id.* at 148-49.

290. *See supra* notes 20-21, 198.

291. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313-14 (1993).

292. *Id.* at 313.

293. *See Carolene Prods.*, 304 U.S. at 152 n.4.

294. *See* Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 779-80 (1987).

295. *Id.* at 785-92 (citing *Hooper v. Bernalillo Co. Assessor*, 472 U.S. 612 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982)). In all three cases, the Court held legislation giving residents benefits over non-residents to be unconstitutional.

296. *Id.* at 793 (discussing *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432 (1985), a case in which the Court used the rational basis test to hold that the city violated the rights of mentally disabled persons by denying a permit to operate a special group home).

297. *Romer v. Evans*, 517 U.S. 620, 632 (1996) (using the rational basis test to strike down an amendment to the Colorado Constitution allowing discrimination based on sexual orientation).

traditional rational basis test.²⁹⁸ When applying this test, “the Court looked more closely at the relationship of the classification to achieving the state’s goal: it did not accept every goal proffered by the state.”²⁹⁹ The analysis used is more akin to intermediate scrutiny.³⁰⁰ However, rational basis with bite is not the appropriate test for food regulation because the laws that the test has invalidated clearly created quasi-suspect classifications.

Intermediate scrutiny has been used by the Court to analyze issues arising from classification based on gender and illegitimacy.³⁰¹ To meet intermediate scrutiny, the government must demonstrate that the challenged law furthers an important government interest in a way that is substantially related to that interest.³⁰² First Amendment jurisprudence also applies intermediate scrutiny to content-neutral expressions.³⁰³ In First Amendment cases, intermediate scrutiny is met if the government action “furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”³⁰⁴ Because recognizing a right to choose what one eats is rooted in a penumbral analysis, intermediate scrutiny may be applicable if the Court does not apply strict scrutiny.

Courts apply strict scrutiny when a state or federal law jeopardizes a fundamental constitutional right, uses a suspect classification, or is a content-based regulation of speech.³⁰⁵ To meet this highest burden of all the constitutional tests, the government must demonstrate a compelling government interest to which the law is narrowly tailored, or is the least restrictive means for achieving that interest.³⁰⁶ When an individual’s core constitutional interests are at risk, the government may only act against those interests in the most pressing circumstances.³⁰⁷ For this reason, the

298. See Pettinga, *supra* note 294, at 800.

299. *Id.* at 801.

300. *Id.*

301. See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982) (gender); *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982) (illegitimacy).

302. *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980).

303. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994).

304. *Id.* (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

305. Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 355 (2006).

306. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 219 (1995).

307. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

government interest must be compelling.³⁰⁸ If a court finds the government's interest compelling, the court then "test[s] the sincerity of the government's claimed objective" by determining whether the law is narrowly tailored.³⁰⁹ For a law to be narrowly tailored it must inhibit no more activity than necessary to achieve the stated compelling interest.³¹⁰ The Court has also phrased this to require that the government employ the "least restrictive means" to achieving the goal.³¹¹ If food choice is established by the Court as a fundamental right, then strict scrutiny should be applied in analyzing cases where state governments or the federal government have regulated food to the point that impedes an individual's right to eat her food of choice.

If recognized as a right protected in any capacity by the Constitution, the Court will likely analyze food regulations under some form of a heightened scrutiny standard. In other words, something more than rational basis applies. Recalling the above discussion of establishing a fundamental right through a penumbra analysis, the Court often applies heightened scrutiny when a penumbral right is found.³¹² One important exception may be found in *Casey*, in which the plurality opinion replaced the strict scrutiny used in *Roe* with an "undue burden" test.³¹³ A law places an "undue burden" on a woman when "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion."³¹⁴ The Court's decision to move away from strict scrutiny in this context centered on the "recognition of the State's 'important and legitimate interest[s] in preserving and protecting the health of the pregnant woman [and] in protecting the potentiality of human life.'"³¹⁵ Though not as immediate and compelling a justification, the government's interest in public health and safety could also be seen by the Court as important enough to merit a

308. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800 (2006).

309. *Id.*

310. *Id.*

311. *Id.* at 800-01, 801 n.30 (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981)) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.").

312. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); *Eisenstadt v. Baird*, 405 U.S. 438, 453-55 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 487-86 (1965).

313. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992).

314. *Id.* at 877.

315. *Id.* at 875-76 (quoting *Roe v. Wade*, 410 U.S. 113, 162 (1973)).

heightened scrutiny standard such as the undue burden analysis when examining whether a regulation infringes on the right to food choice.

Without much guidance from the Court concerning which test may be applied in the food regulation context, the difficulty lies in predicting which test the Court will choose to analyze such claims.

B. Applying the Constitutional Test: State and Federal Regulation Means Too Many Cooks in the Kitchen

Assuming the Court finds a penumbral right to food choice and therefore applies strict scrutiny, the state and federal food regulations banning raw milk would likely be struck down as unconstitutional. The ban on raw milk provides a test case. Federal regulation prohibits all sale and distribution of milk in interstate commerce unless the product has been pasteurized.³¹⁶ To pass constitutional muster, this regulation must further a compelling government interest in a narrowly tailored way such that it is the least restrictive means of furthering that interest. The government's stated interest is in protecting the public health.³¹⁷ Members of the Court have stated in dicta that public health may be a compelling justification for certain government action.³¹⁸ However, that interest was not compelling enough to ban certain religious practices.³¹⁹ Additionally, the possibly compelling government interest in health does not justify infringing on the right to a mother's privacy in choosing to abort a fetus.³²⁰ The bulk of the analysis, therefore, lies within the determination of whether the regulation is narrowly tailored, or the least restrictive means of protecting the public health.

On its face, a total ban of raw milk in interstate commerce is not narrowly tailored. In fact, it appears to be the most restrictive means of protecting public health from milk-borne illness. The Court must consider whether viable alternatives exist to the action taken.³²¹ They do. Labeling is a clear alternative to banning the milk altogether. Because some consumers wish to make the informed decision to drink raw milk, labeling is an appropriate alternative to a ban. The FDA could also restrict sales to permit

316. 21 C.F.R. § 1240.61 (2013).

317. Brief in Support, *supra* note 21, at 8.

318. *Kleindienst v. Mandel*, 408 U.S. 753, 783 (1972) (Marshall, J., dissenting).

319. *See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

320. *See Casey*, 505 U.S. at 846.

321. *See Grutter v. Bollinger*, 539 U.S. 306, 309 (2003) (requiring consideration of alternatives but not exhaustion of every alternative available).

only farm-to-consumer transactions, in other words prohibiting retail sales where labeling would be required. This alternative solves the problem of the unwitting consumer coming across a bottle of raw milk and consuming it without first knowing the risks. But the FDA suggests that children and the elderly may not fully appreciate a label.³²² The FDA seemingly glosses over the fact that it deems labels a perfectly suitable alternative to an outright ban in other contexts, including the sale of cigarettes, household cleaning products, and over-the-counter medication.

The ban on raw milk sales is not the least restrictive means to protect public health and prevent disease. As exemplified by state regulatory schemes, raw milk can be regulated to promote health and safety without completely banning its sale. For example, perhaps the strictest state regulation permitting raw milk sales for human consumption—short of a ban—allows sales only directly from farms to consumers.³²³ Tennessee is one such state, permitting raw milk to be sold for human consumption under a herd share.³²⁴ In New Mexico, where all retail sales are not restricted, no raw milk related illnesses were reported between 2006 and 2011.³²⁵ The only unpasteurized dairy products that caused illness were blue and gouda cheeses.³²⁶ This illustrates that regulations, instead of bans, may promote a low level of illness while allowing citizens to consume raw milk. Therefore, the FDA regulations fail strict scrutiny.

Intermediate or heightened scrutiny will allow for more regulation but will also deem many regulations unconstitutional. Though intermediate scrutiny takes various forms, its hallmark is that the government interest is important and the law furthers the interest in a way that is substantially related to the interest.³²⁷ First Amendment cases have also phrased the second prong as requiring that the law regulate no more activity than is essential to the furtherance of the important interest.³²⁸ More laws are upheld under intermediate scrutiny than strict scrutiny. Using the raw milk regulation again for an example, the interest in protecting the public health has certainly been recognized as important.

322. See Brief in Support, *supra* note 21, at 37.

323. See Farm-to-Consumer Defense Fund, *supra* note 194.

324. See TENN. COMP. R. & REGS. 0080-03-02-.11 (2014).

325. See *Foodborne Outbreak Online Database*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://wwwn.cdc.gov/foodborneoutbreaks/Default.aspx> (last visited May 20, 2014).

326. *Id.*

327. See *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980).

328. See *Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989); *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

The basic question is whether the regulation furthers the interest in a way that is substantially related to that interest, or captures more activity than is “essential” to furthering that interest. Because an outright ban captures all activity, aside from intrastate sales of raw milk, it would seem to capture more activity than essential; however, the intermediate scrutiny analysis does not inherently require consideration of alternatives. The ban on raw milk would likely meet the second prong of intermediate scrutiny if it only requires that the law further the important interest in a way substantially related to the interest. Presumably this means that capturing a “substantial” amount of activity would satisfy the test. The capture of all activity is certainly substantial. If the second prong is defined in terms of the amount of activity captured, the regulation likely fails the second prong of the test.

The various forms of heightened scrutiny could yield differing results. The Court may analyze the infringement of the right to food choice using a test similar to the undue burden test in *Casey*, as the right to bodily integrity is also encompassed as a penumbra of the right to privacy. A ban on interstate raw milk sales could be found to place a substantial obstacle in the path of a person attempting to consume raw milk, but it seems trivial to compare choosing what one eats to the decision to obtain an abortion. Under any test more stringent than rational basis, many regulations will likely fail. Because the FDA currently has sweeping regulatory power,³²⁹ little consideration has been given to how much activity is captured by a regulation or reflection on the obstacles a regulation places in the way of a person’s access to the foods they wish to eat.

X. Conclusion

The right of a person to choose what food she consumes should be considered fundamental as falling within the right to privacy and the right to be free from government intrusion into one’s health decisions. Individuals’ food choices directly affect health outcomes. Because it is clear in Supreme Court jurisprudence, and to common sense, that health choices should be left to the individual, so too should food choice. However, it is highly unlikely that the Supreme Court will completely eliminate FDA or state regulations that are deemed to promote public health and safety. If the Court refuses to recognize “food choice” as fundamental, there must be at least some protection afforded this right in the form of heightened scrutiny. Heightened protection would promote health and

329. See 42 U.S.C. §§ 216, 243, 264, 271 (2012) (granting the Surgeon General and the Secretary of Health and Human Services broad power to create regulations).

safety by ensuring FDA regulations are calculated to protect citizens. Though the right should be deemed fundamental, citizens will most likely have to settle for a balance between their rights and government power, as with every other right recognized by the Supreme Court. The Supreme Court must not allow government food regulation to continue unchecked. Unfettered government discretion to dictate that which citizens consume consequently permits government to control that which makes up individuals' bodies. After all, "you are what you eat."

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